Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

HOWARD WAYNE JOHNSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals erred in denying Petitioner's application for a certificate of appealability based on his counsel's failure to locate and interview key witnesses that could have testified in support of Petitioner's defense and by spending, at most, ten minutes interviewing and preparing the witnesses that testified on Petitioner's behalf.

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Petitioner Howard Wayne Johnson petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The judgment denying Petitioner's request for a certificate of appealability from the court of appeals is unpublished and is reproduced in Appendix A at 1a to 2a. The final judgment entered by the district court denying Petitioner's motion under 28 U.S.C. § 2255 is unpublished and is reproduced in Appendix B at 3a. The order entered by the district court denying Petitioner's motion under 28 U.S.C. § 2255 is unpublished and is reproduced in Appendix C at 4a.

JURISDICTION

The court of appeals entered judgment denying Petitioner's request for a certificate of appealability on June 28, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution states, "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

A. The Allegations Concerning Petitioner's Arrest

On August 19, 1999, deputies from the Sheriff's Department of Tarrant County, Texas executed a search warrant for the arrest of Petitioner at his place of

employment, Predator Car Audio ("PCA").[1] (R. 3:69.) Upon entering PCA, the deputies immediately identified Petitioner and arrested him. (R. 3:94-96.) After handcuffing Petitioner, he was searched by Deputy Kendall Novak. (R. 3:96 & 97.) Allegedly, while searching Petitioner, Deputy Novak found a Star, Model Firestar, .40 caliber handgun (the "Firearm") in the elastic waistband of Petitioner's shorts. (*Id.*)

B. Petitioner's Counsel Provides Limited Testimony at Petitioner's Trial

At Petitioner's trial, his counsel only introduced testimony from Dubresse Cookston ("Cookston") and Steve Wazny ("Wazny"), both of whom were present when Petitioner was arrested. (R. 3:128 & 157.) Shane Smith ("Smith") was also at PCA on the day of Petitioner's arrest. Nonetheless, despite the fact that Petitioner informed his counsel that Smith was present and would testify on his behalf, Petitioner's counsel intentionally neglected to locate Smith and informed Petitioner that Smith was not needed.

Cookston testified that he, not Petitioner, was the owner of the Firearm. (R. 3:133.) Cookston further testified that he purchased the Firearm from Warren Walston ("Walston") in February of 1999. (*Id.*) In addition, Cookston stated that Dustin Arwood ("Arwood") witnessed him purchasing the Firearm. (R. 3:152.) Through Cookston, a bill of sale evidencing Cookston's ownership of the Firearm and the Firearm's case containing warranty papers were introduced into evidence. (R. 3:129 & 130.)

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[1] PCA was in the business of installing automobiles with audio equipment, stereos, alarms, and other electronic devices. (R. 3:71.) All citations to the Record on Appeal will be cited herein as "R. Vol. No.: Page No."

As with Smith, despite being informed of Walston and Arwood's ability to corroborate Cookston's testimony that he, not Petitioner, owned the Firearm, Petitioner's counsel neglected to locate Walston and Arwood and informed Petitioner that they were not needed for the trial.

Cookston further testified that Petitioner did not have the Firearm on his person when he was arrested. (R. 3:140.) Rather, the Firearm was in the back of Cookston's Ford Explorer in a side pocket, which is where he normally kept it during PCA's business hours. (R. 3:136.) Furthermore, Cookston testified that Petitioner was next to him when the deputies ordered them to the ground, and that Deputy Novak did not take the Firearm from Petitioner. (R. 3:138 & 140.) Cookston also testified that the Firearm was far too heavy to have been supported by the elastic waistband in the shorts worn by Petitioner. (R. 3:140.)

In addition, Cookston testified that while on the floor he observed a deputy look into the back of his Ford Explorer. (R. 3:141.) Because of his position, Cookston was unable to see if the deputy took anything from the back of the Ford Explorer. (*Id.*) Cookston did testify, however, that the deputy had the Firearm in his hands as he came around the corner of the Ford Explorer. (*Id.*)

As stated above, Wazny, a self-employed framer and builder of speaker boxes, was also working at PCA the day Petitioner was arrested. (R. 3:158.) Wazny was installing a speaker box in the back of a customer's vehicle when the deputies entered PCA. (R. 3:159.) Wazny testified that he observed Petitioner and Cookston being forced down to the ground by the deputies. (R. 3:160.) Wazny further testified that he did not see Petitioner with the Firearm on his person, and that he did not see any of the deputies remove the Firearm from Petitioner. (R. 3:161.) In addition, Wazny

also corroborated Cookston's testimony that the Firearm was usually kept in the back of the Ford Explorer. (R. 3:165.)

C. Procedural History

Based on the deputy allegedly finding the Firearm in the waistband of Petitioner's shorts, Petitioner was named in a one-count indictment filed in the district court. Under that indictment, Petitioner was charged with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g).[2] After being indicted, the district court appointed J. Warren St. John ("St. John") as Petitioner's counsel. On September 18, 2000, after a one-day trial, a jury convicted Petitioner and the district court then sentenced Petitioner to the statutory maximum of 120 months of imprisonment.

On August 11, 2003, Petitioner filed a motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence with the district court. Thereafter, on November 6, 2003, the district court held a hearing on Petitioner's motion. At that hearing, Walston, Cookston, Wazny, Smith, and Cathy Johnson, Petitioner's wife, testified on Petitioner's behalf and only St. John and his assistant, Colleen Plowman ("Plowman"), testified on behalf of the government.

After that hearing, the district court entered a final judgment and an order denying the relief requested in Petitioner's motion under 28 U.S.C. § 2255. App. 3a & 4a. Petitioner then timely filed a Notice of Appeal and sought a certificate of appealability from the court of appeals pursuant to 28 U.S.C. § 2253. The court of appeals denied Petitioner's request for a certificate of appealability stating that Petitioner had failed to show "that reasonable jurist

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[2] Petitioner had previously been convicted of a felony relating to the possession of a controlled substance.

would find the district court's assessment of the constitutional claims debatable or wrong." App. at 2a (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

REASONS FOR GRANTING THE PETITION

A. Introduction

A person's constitutional right to effective assistance of counsel must be protected. Attorneys have an awesome responsibility when they agree to represent an individual charged with a crime. Based on that responsibility, it is vital that counsel investigates the charges against a client and a client's defenses to those charges. At a minimum, counsel must be expected to attempt to locate and interview witnesses that might be able to assist with the defense of a client. Here, however, Petitioner did not even receive the minimum. Instead, Petitioner's counsel spent a few minutes trying to find one witness, apparently did not even attempt to find two other witnesses, and merely spent approximately ten minutes interviewing and preparing the two witnesses that testified on Petitioner's behalf. As a result, Petitioner was deprived of his Sixth Amendment right to effective assistance of counsel.

B. Standard of Review

A certificate of appealability ("COA") will be granted if a petitioner makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (West Supp. 2003). A petitioner makes a substantial showing of the denial of a constitutional right when he shows "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In determining

whether to issue a COA, appellate courts look to a district court's application of the Antiterrorism and Effective Death Penalty Act to the "petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason. This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Instead, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484; *see also Miller-El*, 537 U.S. at 338 ("[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.").

C. Petitioner's Sixth Amendment Right to Effective Assistance of Counsel Was Violated

Despite his Sixth Amendment right, Petitioner was denied effective assistance of counsel. In *Strickland v. Washington*, this Court set forth the test used to determine whether a criminal defendant's right to effective counsel is violated. 466 U.S. 668, 685 (1984). Under the *Strickland* test, to prevail on a claim of ineffective assistance of counsel, a criminal defendant must show that: (1) counsel's performance fell below an objective standard of reasonableness; and (2) there is a "reasonable probability" that, but for counsel's unprofessional errors, there would have been a different result in the matter. *Id.* at 687-694. In determining the second prong of the *Strickland* test, a "reasonable probability" is a probability "sufficient to undermine confidence in the outcome." *Id.* at 694. Here, as set forth below, St. John provided ineffective assistance, which prejudiced Petitioner, by unreasonably failing to conduct an adequate investigation of the charges against Petitioner and his defenses to those charges.

D. Petitioner's Counsel Failed to Locate and Interview Smith, Walston, and Arwood

It is axiomatic that "[a]n attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense." *Davis v. Alabama*, 596 F.2d 1214, 1217 (5th Cir. 1979), *vacated as moot*, 446 U.S. 903 (1980); *see also Chambers v. Armontrout*, 907 F.2d 825, 828 (8th Cir. 1990) (*en banc*), *cert. denied*, 498 U.S. 950 (1990) ("The decision to interview a potential witness is not a decision related to trial strategy."). "Reasonable performance of counsel includes an adequate investigation of facts, consideration of viable theories, and development of evidence to support those theories." *Foster v. Lockhart*, 9 F.3d 722, 726 (8th Cir. 1993). Here, the decision of Petitioner's counsel not to locate and interview Smith, Arwood, and Walston was not reasonable under "prevailing professional norms," and prejudiced Petitioner. *See Wiggins v. Smith*, 539 U.S. 510, 521 (2003); *see also Soffar v. Dretke*, 368 F.3d 441, 476 (5th Cir. 2004).

Attorneys have a "'duty ... to investigate all witnesses who allegedly [have] knowledge concerning [the defendant's] guilt or innocence.'" *Henderson v. Sargent*, 926 F.2d 706, 711 (8th Cir. 1991) (quoting *Lawrence v. Armontrout*, 900 F.2d 127, 130 (8th Cir. 1990)). "Where a defendant reasonably describes potential witnesses, it is the attorney's responsibility to seek them out, ascertain their value to the defense, and, if appropriate, secure their attendance at trial." *Rummel v. Estelle*, 498 F. Supp. 793, 795 (W.D. Tex. 1980). "[C]ounsel's failure to interview eyewitnesses to a charged crime constitutes 'constitutionally deficient representation.'" *Anderson v. Johnson*, 338 F.3d 382, 391 (5th Cir. 2003) (quoting *Bryant v. Scott*, 28 F.3d 1411, 1418 (5th Cir. 1994)).

In opposing Petitioner's motion under 28 U.S.C. § 2255, St. John asserted that "[a]ll due diligence was executed in the investigation and attempts to locate and interview witnesses." (PX 6 at 7 & 8.)[3] St. John further asserted that an "exhaustive search" was performed to locate witnesses that might be beneficial to Petitioner's defense. (*Id.* at 7.) The evidence submitted in this matter, including St. John's own testimony, however, contradicts St. John's self-serving testimony and shows that St. John did not conduct an adequate investigation of the charges against Petitioner and therefore provided ineffective assistance of counsel.

1. Either St. John Never Hired a Private Investigator or He Engaged the Most Inept Private Investigator that He Could Find

To negate Petitioner's claim that St. John provided ineffective assistance, St. John merely relies on the fact that he allegedly hired a private investigator to locate the witnesses at issue. In particular, St. John argues that he asked Larry Hickman ("Hickman") to help locate witnesses for Petitioner's defense. According to St. John, Hickman is a retired private investigator that used to be a police officer for the City of Haltom and the City of Temple, both of which are located in Texas. (R. 7:74 & 75.) Despite "all due diligence" and an "exhaustive search," however, Hickman was allegedly unable to locate any of the witnesses that he was asked to locate. Other than the testimony of St. John, however, there is not one shred of evidence that an investigator assisted St. John in investigating Petitioner's case. In fact, in light of the evidence submitted, it is doubtful

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[3] All citations to exhibits introduced into evidence by Petitioner at the hearing on Petitioner's motion under 28 U.S.C. § 2255 will be cited herein as "PX No. at Page No." and Respondent's exhibits will be cited as "RX No. at Page No."

that any investigator assisted St. John, and if an investigator did assist, to say the least, he was the most inept investigator St. John could find.

Among the most glaring reasons to question whether an investigator assisted St. John is the fact that Hickman could not find Walston and Arwood even though he had their addresses. At Petitioner's trial, St. John introduced the Firearm's bill of sale into evidence (the "Bill of Sale"). (R. 3:130.) In addition to language conveying the Firearm to Cookston, the Bill of Sale also contains the addresses of Walston and Arwood. (PX 1 at 1.) Specifically, the Bill of Sale clearly lists Walston's address as "6401 Cahoba Drive, Forth Worth, TX 76135" and Arwood's address as "2200 SE 10th St. Mineral Wells, TX 76067." (*Id.*) St. John does not dispute that he had the Bill of Sale before Petitioner's trial and states that he gave his investigator the addresses listed on the Bill of Sale. (R. 7:74, 78, 83, & 85.) Moreover, both Walston and Arwood testified at the hearing on Petitioner's motion under 28 U.S.C. § 2255 that they lived at the addresses listed on the Bill of Sale at the time of Petitioner's trial. (R. 7:13, 14, 20, & 21.) In fact, to this date, Walston's mother and stepfather and Arwood's father and stepmother still live at the addresses listed on the Bill of Sale. (R. 7:13, 14, 20, & 21.) Nonetheless, despite having their addresses and allegedly performing an "exhaustive search," St. John or his investigator were unable to locate Walston and Arwood. (PX 6 at 7.)

One must further question whether St. John actually utilized an investigator based on the simple fact that all of the witnesses that he allegedly could not locate testified at the hearing on Petitioner's motion under 28 U.S.C. § 2255. Without the use of a private investigator, Petitioner had little difficulty locating Smith, Walston, and Arwood for the hearing – even three years after Petitioner's trial. Furthermore, it is apparent from their willingness to testify at

the hearing that none of the witnesses were evading St. John and that all of them would have willingly testified at Petitioner's trial if asked. Accordingly, to say the least, it is doubtful – if not absurd – that a private investigator armed with the Bill of Sale could not locate the same witnesses that Petitioner was able to locate three years later with minimum effort.

St. John has not produced any documents that show an investigator assisted him with this case. On the worksheets he submitted to the district clerk for payment, there is not a single notation in which St. John mentions Hickman. (*See generally* RX 1.) Moreover, no where on those worksheets does St. John even mention that an investigator assisted him with this case. Furthermore, because Hickman allegedly worked for "free," there are no documents evidencing any payments made to Hickman for his services. (R. 7:89.) In addition, St. John never filed a motion to appoint a private investigator with the district court because, in his own words, "if you know anything about the federal system, it's very difficult – it's not difficult, but a lot of times it's hard to get an investigator appointed." (R. 7:89.) Thus, because it might have been difficult, St. John did not even try.

Before Petitioner filed his motion under 28 U.S.C. § 2255, St. John never mentioned having an investigator assist him with this case. The first time St. John ever mentioned using a private investigator was when he submitted his affidavit in support of the government's response to Petitioner's motion under 28 U.S.C. § 2255. In fact, St. John never actually named his alleged investigator until the hearing on Petitioner's motion under 28 U.S.C. § 2255. Hickman's name was not mentioned in St. John's affidavit or anywhere else in the record before that hearing. (PX 6 at 7.) In addition, St. John never informed Petitioner that he was using the assistance of an investigator. (R. 7:51.) Similarly,

St. John did not mention the investigator to Petitioner's wife, Cookston, or Wazny. (R. 7:29, 37, & 44.)

Other than St. John's testimony, the government has not produced any evidence concerning Hickman's involvement in this case. The government has not introduced any documents that evidence Hickman assisted with this case. There has been no testimony from Hickman that he assisted St. John with this case – not even an affidavit. Rather, the only evidence proffered by the government evidencing Hickman's assistance with this case is the mere self-serving testimony of St. John.

St. John's sole defense to Petitioner's claim that he provided ineffective assistance of counsel by not locating and interviewing key witnesses is that he sought the assistance of Hickman in locating potential witnesses. As set forth above, however, the veracity of St. John's assertions must be questioned. Frankly, it just does not add up. First, Hickman had the physical addresses for two of the witnesses (Walston and Arwood) but allegedly still could not find those witnesses. Second, Petitioner, with minimal effort and more than three years later, located the witnesses that Hickman – a professional investigator and former police officer – could not locate. Third, other than St. John's testimony, there is no evidence that St. John engaged Hickman or anyone else to locate witnesses for Petitioner's defense. Fourth, St. John never mentioned Hickman until Petitioner filed his motion under 28 U.S.C. § 2255. The bottom line is that, to say the least, it is doubtful that any investigator assisted St. John in this matter, and if an investigator did assist, he was the most inept investigator St. John could find. In either event, St. John clearly acted unreasonably under prevailing professional standards and therefore provided Petitioner ineffective assistance of counsel.

2. The Record and the Evidence Contradict St. John's Assertion that He Sought Assistance from Petitioner and Cookston in Locating Witnesses

In addition to asserting that he hired an investigator to locate witnesses for Petitioner's defense, St. John claims that he sought the assistance of Petitioner and Cookston in locating certain witnesses, but they were also unable to find those witnesses. Specifically, St. John claims that he asked Petitioner and "Cookston to try and find [Walston]; they both were unsuccessful." (PX 6 at 7; R. 7:73.) St. John further alleges that "Petitioner could not provide an address or location of where [Arwood] might be." (PX 6 at 7.) St. John's assertions, however, are once again contradicted by the record and evidence presented at Petitioner's trial.

As stated above, Arwood and Walston's addresses were listed on the Bill of Sale, which St. John admits was given to him by Cookston. Therefore, rather than not being provided addresses for Arwood and Walton as asserted, St. John just decided not to locate those witnesses at the addresses provided. (R. 7:78.) In fact, when asked if he personally went to the addresses provided, St. John responded by stating, "No." (*Id.*; *see also* 7:88 & 89.) Instead, St. John stated that he *believed* his investigator attempted to locate Walston and Arwood at the addresses on the Bill of Sale. St. John, however, was unable to testify that his investigator personally went to the addresses on the Bill of Sale. (R. 7:74, 75, 79, 84, & 85.) St. John merely testified that his "investigator's practice is if he can't find somebody on the telephone, he physically drives to the location." (R. 7:79.) In addition, when asked if his investigator found Arwood and Walston at the addresses listed on the Bill of Sale, St. John testified that "[m]y *indication* from [the investigator] was when he – *whatever address he ended up going to*, he didn't talk to anybody." (*Id.* (emphasis added).) Thus, St. John's alleged "exhaustive search" did not include him

personally visiting the addresses provided for Walston and Arwood; rather, it consisted of him approaching an investigator that *might have* (St. John does not know) went to the provided addresses *once* but did not talk to anyone at "whatever address[es] he ended up going to." (*Id.*)

The testimony at Petitioner's trial also contradicts St. John's assertion that he asked Cookston to locate Walston, but Cookston was "unsuccessful" in locating Walston. Indeed, the following testimony was given during *St. John's direct examination* of Cookston at Petitioner's trial:

Q. Do you know where Warren Walston is now?
A. Yes, sir, I do.
Q. Where is he?
A. He lives on Cahoba Drive in Lake Worth.
Q. What part of town do you live in?
A. Lake Worth.
Q. So you live in the same area he lives?
A. Yes, sir.[4]

(R. 3:142.)

Therefore, despite St. John's assertions, Cookston did give Walston's address to St. John.

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[4] It should be noted that the Bill of Sale also reflects that Walston resided on Cahoba Drive during the time of Petitioner's Trial. (PX 6 at 1.)

3. St. John's Records Show that He Never Attempted to Locate Walston or Arwood, and His Search for Smith Merely Consisted of a Few Telephone Calls Only Days Before Petitioner's Trial

According to the records St. John submitted to the district court, he never attempted to locate Walston or Arwood, and he only attempted to locate Smith a few days before Petitioner's trial by merely making a few telephone calls. In order to be paid for his representation of Petitioner, St. John submitted an Out-of-Court Worksheet and an Appointment of and Authority to Pay Court Appointed Attorney (collectively, the "Worksheets") to the district court. In the Worksheets, there is only one reference to St. John attempting to locate any witnesses for Petitioner's trial. Specifically, on the Out-of-Court Worksheet, there is a notation that St. John attempted "to reach witness Shane Smith by telephone" on September 12, 2000, which was a few day before Petitioner's trial.[5] (RX 1 at 3.) According to that notation, St. John spent eighteen to twenty-four minutes (.4 of time) in trying to locate Smith by telephone. (*Id.*) Other than the September 12, 2000 entry, there are no other references to St. John attempting to locate Smith. (*See generally* RX 1.)

In addition, there are no references to St. John attempting to locate Walston or Arwood on the Worksheets. Walston and Arwood's names are not located anywhere on the Worksheets. Moreover, there are no references to St. John engaging or conferring with Hickman or any other private investigator on the Worksheets. (*See generally* RX 1.)

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[5] Petitioner's trial was scheduled and held on September 18, 2000.

At the hearing, despite the information on the Worksheets, St. John claimed that he spent "[a] great deal of time" investigating the claims against Petitioner. (R. 7:94.) When asked whether the information on the Worksheets was true and correct, however, St. John stated, "Everything is there, yes, sir."[6] (R. 7:95 & 96.) Accordingly, based on St. John's own documentation, which he affirmed as true and correct, St. John never attempted to locate Walston or Arwood. Moreover, St. John's search for Smith only began a few days before Petitioner's trial and merely consisted of St. John attempting a few telephone calls for a few minutes. Without a doubt, St. John's records do not show that he used all "due diligence" or performed an "exhaustive search" in locating Smith, Walston, or Arwood. Rather, St. John's records evidence that he acted unreasonably under prevailing professional standards and provided Petitioner with ineffective assistance of counsel that prejudiced him.

4. St. John's Actions Contradict His Testimony Concerning His Strategy that He Was Focused on Finding Smith and Not the Other Witnesses

At the hearing, St. John attempted to justify his failure to locate Arwood and Walston by arguing that his main focus was on locating Smith. Specifically, St. John repeatedly pointed out that he "was more concerned about finding Shane Smith than anybody [else]." (R. 7:86, 73, 74, & 90.) St. John's testimony, however, is contradicted by his own actions.

On September 12, 2000, St. John filed a motion for continuance. (PX 7.) In the motion for continuance, St. John stated that "[Petitioner] would show that his

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[6] When signing an Appointment of and Authority to Pay Court Appointed Attorney, an attorney must "swear or affirm the truth or correctness" of the statements in it.

undersigned attorney of record is attempting to locate a fact witness in Burleson and has been unable to locate him." (*Id.* at 1.) When asked if he filed the motion for continuance to locate Smith, however, St. John stated that he filed it because he had "an indication that Mr. Walston could be in Burleson." (R. 7:90; *see also* PX 6 at 7.) Thus, despite allegedly being "more concerned about finding Smith," St. John filed the motion for continuance because he was attempting to locate Walston and not Smith. Even though Smith allegedly was the "more important witness," St. John never filed a motion for continuance based upon his inability to locate Smith.[7]

In fact, according to the witness list filed by St. John, he never anticipated calling Smith to testify. On September 12, 2000, St. John filed a Witness List for the Petitioner's trial. (PX 9.) In the witness list, St. John advised the district court that he anticipated the following witnesses to be called: (1) Cathy Johnson; (2) Dubresse Cookston; (3) Warren T. Walston; (4) Steve Allen Wazny; (5) F.L. Heckman; and (6) K. Novak. (*Id.* at 1.) Moreover, during his testimony, St. John stated that the Witness List reflected who he expected to testify at Petitioner's trial. (R. 7:97.) Thus, even though

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[7] St. John filed the motion for continuance less than a week before Petitioner's trial. The district court denied the motion for continuance one day after it was filed explaining that the "motion states that defendant is attempting to locate a fact witness in Burleson. The motion does not provide any further information. The Court is unable to determine whether the testimony of the unidentified witness is material and necessary to a proper defense." (PX 7 at 1.) St. John had more than enough time to file another motion for continuance explaining that the witness he was attempting to locate was material and necessary to a proper defense of Petitioner. Nonetheless, St. John elected not to file another motion for continuance, and Petitioner's trial went forward as scheduled.

St. John was allegedly "more concerned" about Smith, his name was not on the Witness List.[8]

If St. John's focus was actually on locating Smith, St. John would have listed Smith as a potential witness or filed a motion for continuance based on his inability to locate Smith. St. John did not do the foregoing because his focus was not on locating Smith as alleged. Rather, during his testimony, St. John was merely "grasping at straws" in hope of justifying his inadequate investigation. In fact, according to his own records, St. John's "focused" search of locating Smith merely consisted of St. John making a few telephone calls.

Based on the foregoing, it is clear that St. John did not assert any diligence, much less "due diligence," in locating Smith, Arwood, or Walston. Rather, all "due diligence" and an "exhaustive search" merely meant St. John spent a few minutes one day attempting to contact a witness by telephone. Accordingly, St. John's actions clearly fell below a professional standard of reasonableness and Petitioner was therefore provided ineffective assistance of counsel.

B. St. John Provided Ineffective Assistance by Failing to Make an Adequate Factual Investigation of Cookston and Wazny

By failing to reasonably interview the witnesses that testified on Petitioner's behalf, St. John failed to conduct an adequate factual investigation into the charges against Petitioner. A defense counsel's practice of not interviewing witnesses is an "absurd and dangerous policy" that contravenes an attorney's essential duty to make an adequate factual investigation and can "only be viewed as an

---

[8] It should be noted that Arwood's name is also not on the Witness List. (*See* PX 9.)

abdication – not an exercise – of his professional judgment." *McQueen v. Swenson*, 498 F.2d 207, 216 (8th Cir. 1974). Here, counsel's duty could not be more specific, or his breach of it more obvious. By failing to properly interview and prepare the witnesses that testified on Petitioner's behalf, St. John provided ineffective assistance.

At trial, Cookston and Wazny testified on Petitioner's behalf. (R. 3:28 & 157.) Unfortunately, however, St. John failed to adequately interview either of them before they testified. As substantiated by the evidence submitted at the hearing on Petitioner's motion under 28 U.S.C. § 2255, St. John really only conferred with Cookston and Wazny on two occasions not on several occasions as alleged and only for approximately ten minutes each. (R. 7:24-27, 32-37, & 42-44.) The first time they met with St. John was on August 15, 2000. (R. 7:24-26, 32-35, 42, 50, & 51.) On that date, Petitioner, Wazny, Cookston, and Petitioner's wife went to Mr. St. John's office. (R. 7:24-26, 32-35, 42, 50, & 51.) After they arrived, St. John's assistant asked Cookston and Wazny to write down what happened the day Petitioner was arrested. (*Id.*) After Cookston and Wazny did as asked, St. John's assistant then incorporated what Cookston and Wazny wrote into separate affidavits. (*Id.*) Only after Cookston and Wazny signed their affidavits did Petitioner, Wazny, Cookston, and Petitioner's wife finally meet with St. John. (*Id.*) At that time, they only talked to St. John for a few minutes. (*Id.*) During that conversation, St. John did not ask Cookston and Wazny any questions about their affidavits or the facts surrounding Petitioner's arrest.

The only other time Cookston and Wazny met with St. John was on the day of Petitioner's trial. (R. 7:26, 27, 36, 37, 43, & 44.) At that time, they both talked to St. John in the hallway of the courthouse for less than five minutes each. (*Id.*) Those conversations were brief, and before Cookston and Wazny took the stand to testify, Cookston and Wazny

had no idea what St. John was going to ask them during their direct examinations. (R. 7:26, 27, 36, 37, 43, & 44.)

St. John disputes that he did not adequately interview and prepare Cookston and Wazny for their testimony. Specifically, St. John asserts that "Mr. Cookston came to [his] office several times to discuss the case." (PX 6 at 7.) It appears, however, "several times" actually meant, maybe, one or two other times for a minute. In particular, St. John's legal assistant testified that Cookston came into St. John's office "[m]aybe once or twice, without an appointment." (R. 7:106.) St. John's legal assistant further testified that she believed that St. John spoke with Cookston on only one of those "unannounced occasions." (R. 7:106-107.) When St. John was asked why his Out-of-Court Worksheet did not reflect the "unannounced occasions" Cookston came by his office, St. Johns stated:

> Mr. Cookston came to the office the first two times, he was there for about a minute. I'm not going to charge the court for about a minute worth of talking to somebody. He brought the bill of sale to us. The first time he came, he came unannounced.... He said he could get the bill of sale. He came back with the bill of sale. The whole thing took about a minute or so. There was no formal sit-down discussion with him.

(R. 7:83; *see also* R. 7:73 & 106.)

Thus, even if he spoke with Cookston on more than two occasions, he only did for an additional minute and did not have a "formal sit-down with him" on those occasions.

With Petitioner's liberty at stake, St. John spent, at most, ten minutes interviewing and preparing Cookston and Wazny for their testimony at trial. Most, if not all, of the discussion

with Cookston and Wazny took place the day of Petitioner's trial in the hallway of the courthouse and did not even concern the facts on which their testimony would be based. Because of his failure to properly interview Cookston and Wazny, St. John was clearly not prepared to question them at trial, which was evident in their testimony. The actions of St. John in spending a total of ten minutes with Cookston and Wazny to ascertain the facts of Petitioner's case fell below an objective standard of reasonableness.

C. There is a Reasonable Probability that, but for the Unprofessional Errors of Petitioner's Counsel in Failing to Adequately Investigate the Charges Against Petitioner and His Defenses to Those Charges, the Outcome of Petitioner's Trial Would Have Been Different

There is a reasonable probability that, but for the unprofessional errors of Petitioner's Counsel, the outcome of Petitioner's trial would have been different. Clearly, St. John acted unreasonably under prevailing professional standards by failing to locate and interview Smith, Walston, and Arwood. In addition, it was unreasonable for St. John not to conduct an adequate factual investigation into the testimony of Cookston and Wazny. If it was not for the foregoing errors, there is a reasonable probability that the outcome of Petitioner's trial would have been different.

1. Smith's Testimony at the Hearing on Petitioner's Motion Under 28 U.S.C. § 2255

At the hearing, on Petitioner's motion under 28 U.S.C. § 2255, Smith stated that he would have testified at Petitioner's trial if asked. (R. 7:61.) Specifically, Smith would have been able to testify that he was working at PCA on the day that Petitioner was arrested and at no time did he see Petitioner with the Firearm or a holster. (R. 7:56-60.)

Smith would have further testified that he was working on a vehicle with Petitioner just minutes before he was arrested and did not see Petitioner with the Firearm. (*Id.*) Moreover, Smith would have testified that Petitioner was wearing elastic shorts that could not support the Firearm. (*Id.*) Smith's testimony would have supported Cookston's testimony that Deputy Novak did not find the Firearm on Petitioner's person and that Deputy Novak actually retrieved the Firearm from the back of Cookston's Ford Explorer. (R. 3:136, 138, & 140.) Undoubtedly, with such testimony, the jury would have given Cookston's testimony more credibility. With Smith testifying that Petitioner did not have the Firearm on the day he was arrested, there is a reasonable probability the jury would have found a reasonable doubt in favor of Petitioner.

2. Walston and Arwood's Testimony at the Hearing on Petitioner's Motion Under 28 U.S.C. § 2255

Arwood and Walston also testified at the hearing on Petitioner's motion under 28 U.S.C. § 2255 and would have testified at Petitioner's trial if asked. In particular, Walston would have testified that he purchased the Firearm at a gun show in Fort Worth, Texas and later sold it to Mr. Cookston. (R. 7:18-22.) Arwood would have also been able to testify to Cookston's purchase of the Firearm. (R. 7:11, 12, 14, & 15.) Moreover, Walston would have been able to verify that he prepared the Bill of Sale, and Arwood would also have been able to verify Walston's testimony. (R. 7:11, 12, 14, 15, & 18-22.) The testimony of Walston and Arwood would have been vital to reinforcing Cookston's testimony and discrediting Deputy Novak's testimony that he found the Firearm on Petitioner's person. (R. 3:96 & 97.) With such testimony, there is a reasonable probability the jury would have found a reasonable doubt in favor of Petitioner.

3. The Government Questions Cookston's Credibility

The government's closing argument at Petitioner's trial clearly illustrates the prejudice he suffered by St. John's failure to locate Smith, Walston, and Arwood. St. John's mistake in not having Walston and Arwood testify about the Bill of Sale was evident even to the government. In particular, the government did not hesitate to point out Walston and Arwood's absence to the jury:

> Now, the defendant tells Deputy Heckman what? I bought the gun at a gun show. Well, you know you can go buy a gun at a gun show. Now, his buddy [Cookston] comes in and he's got this little Bill of Sale. There's no notary there. They certainly could have brought the other two fellows [Walston and Arwood] that supposedly was part of this sale. They could have brought them just like he brought his little pal if it were so.

(R. 7:176.)

Based on the absence of Smith, Arwood, and Walston, the government made Cookston's credibility an issue. The following are a few of the passages in which the government attempts to completely discredit Cookston:

> So that leaves you with who are you going to believe between Mr. Cookston and these two deputy sheriffs, who have no reason to lie. Mr. Cookston is obviously his buddy. He's known him long before he went to work there. He's eaten supper at his house. The defendant has come to his house. They ride motorcycles three times a week. They are buddies, okay?

....

> Now, I submit to you that Mr. Cookston is a good enough friend that he would go buy a weapon for his buddy who is a convicted felon. Perhaps they were both at that gun show together and Mr. Cookston bought it on his behalf....
>
> ....
>
> It was on his waistband, ladies and gentlemen. It was in that holster fully loaded on his hip. And it's just the truth. And the only person he's got to contradict that is his little buddy; and his little buddy, obviously, liked him a whole lot.
>
> ....
>
> It only took a couple of hours to bring you this evidence, because the case is just that simple. There is no reason for Deputy Novak to lie, no reason for Deputy Gabbert to lie, and every reason for his friend [Cookston] to cover his back. Thank you.

(R. 7:176-177 & 183-184.)

Smith, Arwood, and Walston's testimony would have clearly given credence to Cookston's credibility and discredited Deputy Heckman. In so doing, there is a reasonable probability that the jury would have found a reasonable doubt in favor of Petitioner.

As set forth above, there is a reasonable probability that, but for the unprofessional errors of St. John, there would have been a different result in the outcome of Petitioner's trial. *Strickland v. Washington*, 466 U.S. 668, 685 (1984). Moreover, based on the evidence presented in this matter, reasonable jurists would find the district court's assessment

of whether St. John provided ineffective assistance of counsel by failing to conduct an adequate investigation of the charges against Petitioner debatable or wrong.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-10038
USDC No. 4:03-CV-848-A
USDC No. 4:00-CR-119-ALL-A

UNITED STATES OF AMERICA,

Plaintiff-Appellee

versus

HOWARD WAYNE JOHNSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

(Filed Jun. 28, 2004)

O R D E R:

Howard Wayne Johnson, a federal prisoner, seeks a certificate of appealbility (COA) to appeal the district court's denial of his 28 U.S.C. § 2255 motion, which he filed to challenge his conviction and 10-year sentence for being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). To obtain a COA, Johnson must "make a substantial

showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

Johnson argues that his trial counsel rendered ineffective assistance by failing to advise him of a plea agreement offered by the Government and for failing to advise him of his "available options" and the consequences thereof. He also argues that his trial counsel rendered ineffective assistance in the investigation of his case by failing to (1) locate potential witnesses Dustin Arwood, Warren Walston, and Shane Smith, and (2) adequately prepare for the trial examination of witnesses Dubresse Cookston and Steve Wazny.

Johnson has not shown "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Accordingly, his motion for a COA is DENIED.

/s/ Rhesa H. Barksdale
RHESA H. BARKSDALE
UNITED STATES CIRCUIT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

HOWARD WAYNE JOHNSON,	§	
	§	
Petitioner,	§	
	§	
VS.	§	NO. 4:00-CR-119-A
	§	NO. 4:03-CV-848-A
UNITED STATES OF AMERICA,	§	
	§	
Respondent.	§	

FINAL JUDGMENT

(Filed Nov. 6, 2003)

In accordance with the court's order of even date herewith,

The court ORDERS, ADJUDGES and DECREES that the motion of Howard Wayne Johnson to vacate, set aside or correct his sentence pursuant to 28 U.S.C. section 2255 be; and is hereby, denied.

SIGNED November 6, 2003.

/s/ John McBryde
JOHN McBRYDE
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

HOWARD WAYNE JOHNSON,	§	
	§	
Petitioner,	§	
	§	
VS.	§	NO. 4:00-CR-119-A
	§	NO. 4:03-CV-848-A
UNITED STATES OF AMERICA,	§	
	§	
Respondent.	§	

ORDER

(Filed Nov. 6, 2003)

Came on for consideration the motion of petitioner, Howard Wayne Johnson, to vacate, set aside or correct his sentence pursuant to 28 U.S.C. section 2255. For the reasons stated on the record at the hearing held on the date of the signing of this order,

The court ORDERS that the above-described motion of petitioner be, and is hereby, denied.

SIGNED November 6, 2003.

/s/ John McBryde
JOHN McBRYDE
United States District Judge

(2)

Supreme Court, U.S.
FILED
DEC 17 2004
OFFICE OF THE CLERK

No. 04-439

In the Supreme Court of the United States

HOWARD WAYNE JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was denied effective assistance of counsel by his counsel's alleged failure to locate certain witnesses and engage in additional pre-trial witness preparation.

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In the Supreme Court of the United States

No. 04-439

HOWARD WAYNE JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. App. 1a-2a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 2004. The petition for a writ of certiorari was filed on September 27, 2004 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). He was

sentenced to 120 months of imprisonment, to be followed by three years of supervised release. On direct appeal, the conviction and sentence were affirmed. 34 Fed. Appx. 962 (5th Cir. 2002) (Table). Thereafter, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255, alleging ineffective assistance of counsel. The district court denied the motion (Pet. App. 3a-4a), and the court of appeals denied petitioner's motion for a certificate of appealability. *Id.* at 1a-2a.

1. On August 19, 1999, Tarrant County Sheriff's Department deputies executed a search warrant for petitioner at Predator Car Audio, an automobile audio business owned by a woman who petitioner subsequently married. At the scene, Deputy Kendall Novak handcuffed petitioner, frisked him for weapons, and found a Firestar .40-caliber handgun in a holster attached to petitioner's front waistband. The agents also seized drugs, cash, and other firearms from the premises. A few days later, while in custody, petitioner admitted that he had purchased the firearm at a gun show. Gov't C.A. Br. 3-6 & n.4.

At trial, Dubresse Cookston and Steve Wazny, both of whom were in the audio store during the execution of the warrant, testified for petitioner. Cookston, an employee of Predator Car Audio, testified that the Firestar handgun was his and that he had purchased the handgun for $350 from a man named Warren Walston in February 1999—a claim supported by a bill of sale and warranty papers introduced at trial. Cookston also testified that he kept the firearm in the back of his Ford Explorer when the shop was open, and that he had, in fact, placed the gun in the car's back side-pocket on the day of petitioner's arrest. Cookston maintained that petitioner was next to him when the police entered the business, and he did not see the gun

in petitioner's waistband. In addition, Cookston did not see the deputies remove the gun from petitioner. Rather, according to Cookston, a deputy looked into the back of his Ford Explorer and emerged from behind the car with the gun in his hands. Finally, Cookston testified that the firearm was far too heavy to have been worn on petitioner's elastic waistband. Gov't C.A. Br. 7-8.

Steve Wazny, a self-employed speaker-box builder, testified that he and other individuals were installing boxes in a customer's vehicle when the deputies arrived. Wazny claimed that he had never seen petitioner carry a gun, that he did not see any officer remove a firearm from petitioner, and that the seized handgun was usually stored in the back of Cookston's Ford Explorer. Gov't C.A. Br. 8.

On September 18, 2000, the jury returned a guilty verdict, and the district court sentenced petitioner to the statutory maximum of 120 months of imprisonment. Pet. App. 1a.

2. After his conviction was affirmed on direct appeal, petitioner filed a motion to vacate his sentence under Section 2255, arguing that his trial counsel, Warren St. John, was ineffective. Specifically, petitioner claimed that St. John had failed to interview key witnesses and had spent an inadequate amount of time preparing defense witnesses.

To support his claim, petitioner called three witnesses—Dustin Arwood, Warren Walston, and Shane Smith—who stated that they would have testified on petitioner's behalf but were never approached by St. John. Arwood testified that he would have corroborated Cookston's testimony about the gun's ownership, because he was present when Walston sold the Firestar handgun to Cookston. 11/6/03 Tr. 11-

12. Walston, moreover, testified that he would have admitted selling the Firestar handgun to Cookston. *Id.* at 16-22. Smith would have testified that he was working at the auto audio store on the day petitioner was arrested and had not seen petitioner with a firearm on the premises. Smith admitted, however, that he had left the premises before the officers arrived and was not present during petitioner's arrest. *Id.* at 56-63.

In addition, Cookston and Wazny testified that they had minimal contact with St. John before trial and that St. John failed to ask them for information about other potential defense witnesses. 11/6/03 Tr. 23-32, 32-40. Petitioner testified that he personally met with St. John three times before his trial. *Id.* at 47-48.

St. John and his legal assistant, Colleen Plowman, testified for the government. 11/6/03 Tr. 63-78, 102-106. St. John stated that he had attempted to locate Smith (to no avail) using information petitioner had provided him. *Id.* at 73-74. St. John eventually hired a private investigator to interview Arwood, Walston, and Smith, but the investigator was unable to locate them. *Id.* at 73-76. With respect to the witnesses he located, St. John testified that he had conducted a formal two-hour interview of Cookston and Wazny at his office, in addition to meeting with Cookston on two other occasions, talking with Wazny by telephone on one occasion, and talking repeatedly to petitioner and his wife. *Ibid.*

3. The district court denied petitioner's motion on the ground that "St. John did what a reasonable lawyer would be expected to do to locate the witnesses." 11/6/03 Tr. 107-108; Pet. App. 3a, 4a. In addition, any failure to investigate was not prejudicial, the court observed, because "even if additional witnesses had been produced, they wouldn't have added anything to

the testimony that was received at trial and they wouldn't have changed the outcome even if they had been brought as witnesses." 11/6/03 Tr. 108. The court stated that the jury had the bill of sale and "heard the testimony of Mr. Cookston relative to the transaction. Obviously, the jury followed the Court's instruction that the issue was possession. It wasn't a matter of who owned the gun. It was who possessed it." *Ibid.* Thus, the court concluded, the verdict would not have changed "if those witnesses had been brought in." *Ibid.*

4. The court of appeals denied petitioner's motion for a certificate of appealability. Pet. App. 1a-2a.

ARGUMENT

Petitioner contends (Pet. 5-24) that his trial counsel failed to investigate the case and prepare defense witnesses, in violation of his right to the effective assistance of counsel under the Sixth Amendment. Because petitioner's ineffectiveness claim lacks merit and petitioner challenges only the facts found by the district court and court of appeals, further review by this Court is not warranted.

1. Under 28 U.S.C. 2253, a court of appeals may not issue a certificate of appealability unless the applicant has "made a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). Accordingly, petitioner must show that reasonable jurists could debate whether the petition would have been resolved differently or that the issues presented required further action. See *Miller-El* v. *Cockrell*, 537 U.S. 322, 336 (2003); *Slack* v. *McDaniel*, 529 U.S. 473, 484 (2000). Petitioner cannot meet this standard.

a. To demonstrate that St. John rendered ineffective assistance, petitioner must show (i) that his counsel's performance was deficient, and (ii) that "there is a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would be different." *Strickland* v. *Washington*, 466 U.S. 668, 687, 694 (1984). See generally *Wiggins* v. *Smith*, 539 U.S. 510, 534 (2003); *Bell* v. *Cone*, 535 U.S. 685, 695 (2002). Where counsel's pre-trial investigation is challenged as deficient, a court must evaluate, with due deference to counsel's actions, whether the level of investigation was reasonable. As this Court has observed in the death penalty context, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. Thus, "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Ibid.*

Under that standard, St. John's assistance was clearly effective. The record amply demonstrates that St. John's investigation and his decision to curtail it were reasonable. Before trial, St. John interviewed petitioner, Cookston, Wazny, and petitioner's wife, and obtained the bill of sale and warranty for the Firestar handgun. St. John asked petitioner for Smith's contact information and attempted to locate Smith personally. He also directed an investigator to locate Arwood, Walston, and Smith, but the investigator was unable to locate them. See 11/6/03 Tr. 73-76. Having interviewed, or attempted to locate and interview, all witnesses brought to his attention, St. John's investigation and his curtailment of the investigation after additional witnesses could not be located was "supported by reasonable professional judgment." *Burger* v. *Kemp*, 483 U.S. 776, 794 (1987).

In addition, the record demonstrates that St. John's pre-trial preparation of Cookston and Wazny was ade-

quate. St. John met with the witnesses in person for over two hours and discussed their testimony via telephone. 11/6/03 Tr. 73-77. In light of the fact that Cookston's and Wazny's testimony was straight-forward and involved only their recollections of petitioner's arrest and the purchase of the Firestar handgun, little additional preparation was necessary.

Petitioner does not challenge the overall standard governing ineffective assistance claims. Nor does he dispute that, as found by the district court and court of appeals, the facts support the conclusion that St. John's assistance was adequate. Rather, petitioner challenges (Pet. 8-17) the facts found by the courts below. Specifically, petitioner disagrees with the district court's crediting of St. John's testimony that he attempted to locate witnesses himself and hired a private investigator to locate potential witnesses. Pet. 8, 14-15. Petitioner also challenges St. John's factual representation of the amount of time he spent preparing Cookston and Wazny. Pet. 17-20. As such, petitioner's claims involve only disputes of fact, not legal questions. This Court does not grant review to revisit factual findings by the courts below in the absence of obvious error, see *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 841 (1996), of which there is none here.

b. In any event, petitioner's ineffectiveness claim lacks merit because petitioner suffered no prejudice. As the district court observed (11/6/03 Tr. 108), whether Cookston owned the firearm was irrelevant, because the government needed to demonstrate only petitioner's possession of the Firestar under Section 922(g)(1). See, *e.g.*, *United States* v. *Hubbard*, 61 F.3d 1261, 1272 (7th Cir. 1995), cert. denied, 516 U.S. 1175 (1996); *United States* v. *Boykin*, 986 F.2d 270, 274 (8th Cir.) ("ownership is irrelevant to the issue of

possession"), cert. denied, 510 U.S. 888 (1993). Thus, Arwood's and Walston's testimony on that issue was immaterial. Moreover, because the jury already had the gun's bill of sale and heard Cookston's testimony about owning the gun, Arwood's and Walston's testimony would have been cumulative. Smith's testimony, likewise, would have had no value, because he could not have testified about petitioner's possession of the firearm, as Smith admitted that he was not in the auto audio store when the police arrived. Accordingly, Arwood's, Walston's, and Smith's testimony would not have created a reasonable probability of a different outcome.

Finally, petitioner has failed to demonstrate any prejudice from St. John's purported inadequate preparation of Cookston and Wazny. Indeed, the petition fails to argue that Cookston's and Wazny's testimony would have been different had St. John spent additional time with them.

2. This case should not be held pending a decision in *Rompilla* v. *Beard*, cert. granted, No. 04-5462 (Sept. 28, 2004). One of the issues in that case is whether capital defense counsel rendered deficient assistance in failing to obtain all reasonably available records on the defendant's background, when interviews with the defendant, his family members, and three mental health professionals gave counsel no reason to conclude that the records would contain mitigating evidence. There is no likelihood that the resolution of that question would have any relevance for the fact-specific ineffective assistance claim made here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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THOMAS E. BOOTH
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DECEMBER 2004

(3)

Supreme Court, U.S.
FILED
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No. 04-439

IN THE
SUPREME COURT OF THE UNITED STATES

HOWARD WAYNE JOHNSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

In its brief in opposition, the government argues that Petitioner's Petition for Writ of Certiorari should be denied because Petitioner's counsel acted reasonably in attempting to locate witnesses that would have testified on Petitioner's behalf, and further, regardless of his counsel's actions, Petitioner was not prejudiced. The government, however, is wrong. Petitioner's counsel did not act reasonably under prevailing professional standards in locating witnesses that would have testified on Petitioner's behalf, and moreover, Petitioner was prejudiced by his counsel's failure to act reasonably.

REASONS FOR GRANTING THE PETITION

A. St. John Did Not Act Reasonably Under Prevailing Professional Standards in Attempting to Locate Witnesses

At the hearing on Petitioner's motion under Section 2255, Petitioner's trial counsel, Warren St. John, admitted that he had Dustin Arwood and Warren Walston's addresses but never personally attempted to locate them at those addresses. (R. 7:78.) If St. John would have gone to the addresses provided for Arwood and Walston, he would have been able to locate them.[1] (R. 7:13, 14, 20, & 21.) St. John knew that Arwood and Walston's testimony would have corroborated Dubresse Cookston's testimony and would have provided further evidence that Petitioner did not possess the Firestar firearm he was arrested for allegedly

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[1] Both Arwood and Walston testified at the hearing that at the time of Petitioner's trial they lived at the addresses provided to St. John. (R. 7:13, 14, 20, & 21.) In fact, Walston's mother and stepfather and Arwood's father and stepmother still live at those addresses. (R. 7:14 & 21.)

possessing. Nonetheless, St. John never personally went to the addresses provided for them. (R. 7:78.)

St. John was further unable to testify to whether his investigator actually attempted to locate Arwood and Walston at the addresses provided for them.[2] (R. 7:79, 84 & 85.) Instead, St. John merely testified that his "investigator's practice is if he can't find somebody on the telephone, he physically drives to the location." (R. 7:79.) Moreover, when asked whether his investigator spoke to anyone at the addresses provided for Arwood and Walston, St. John responded that it was his "indication" that "whatever address [the investigator] ended up going to, he didn't talk to anybody." (*Id.*)

St. John also knew that Shane Smith was present the day Petitioner was arrested and would have been able to testify that Petitioner did not possess the Firestar firearm at the time of his arrest. Even so, St. John's search to locate Smith only began a few days before Petitioner's trial and merely consisted of St. John attempting a few telephone calls for a few minutes. (R. 7:88 & 96; RX 1.)

Based on the foregoing, St. John did not act reasonably in conducting his pre-trial investigation of the charges against Petitioner. An attorney acting reasonably under prevailing professional standards would have: (1) personally gone to the addresses provided for Arwood and Walston; (2) insisted on his investigator actually going to their addresses; (3) verified that his investigator did go to their addresses; (4) insisted that his investigator at least talk

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[2] As set forth in the Petition for Writ of Certiorari, Petitioner disputes whether an investigator actually ever assisted St. John with Petitioner's case. (Pet. at 8-11.) Other than St. John's self-serving testimony, the government did not introduce any evidence that St. John actually sought the assistance of an investigator to locate Arwood, Walston, and Smith. (*Id.*) In fact, St. John's testimony is contradicted by the evidence. (*Id.*)

to someone at their addresses; and (5) spent more than a few minutes attempting to locate Smith. Accordingly, even giving St. John's judgment due deference, St. John's investigation to locate Smith, Arwood, and Walston was not reasonable under prevailing professional standards. *See Rummel v. Estelle*, 498 F. Supp. 793, 795 (W.D. Tex. 1980) ("Where a defendant reasonably describes potential witnesses, it is the attorney's responsibility to seek them out, ascertain their value to the defense, and, if appropriate, secure their attendance at trial."); *see also Chambers v. Armontrout*, 907 F.2d 825, 828 (8th Cir. 1990) (*en banc*), *cert. denied*, 498 U.S. 950 (1990) ("The decision to interview a potential witness is not a decision related to trial strategy.").

B. Petitioner was Prejudiced by St. John's Failure to Locate Smith, Arwood, and Walston

At Petitioner's trial, only Deputy Kendall Novak testified that Petitioner was in possession of the Firestar firearm at the time of his arrest. (R. 3:97.) No other deputies witnessed Petitioner in possession of the firearm. (R. 3:86.) Accordingly, the government's case hinged on the testimony of Deputy Novak. Without that testimony, the government would have been unable to present any evidence that Petitioner was in possession of the Firestar firearm at the time of his arrest. Deputy Novak's testimony was contradicted by Cookston's testimony that he owned the Firestar firearm and that Petitioner did not possess it when Petitioner was arrested. Accordingly, Arwood and Walston's testimony would have discredited Deputy Novak's testimony and would have corroborated Cookston's testimony.

In arguing that Petitioner possessed the Firestar firearm, the government challenged Cookston's credibility. Specifically, during its closing argument, the government repeatedly referred to Cookston as Petitioner's "buddy" or

"little buddy" and argued that Cookston's testimony could not be believed because he was obviously "covering" for Petitioner. (R:176-177 & 183-184.) Furthermore, the government used Walston and Arwood's absence from the trial to argue that Cookston was lying. Specifically, the government argued that Petitioner "could have brought the other two fellows [Walston and Arwood] that supposedly was part of this sale. They could have brought them just like he brought his little pal [Cookston] if it were so." (R. 7:176.)

The government asserts that Walston and Arwood's testimony would have been immaterial because "whether Cookston owned the firearm was irrelevant." (Opp'n at 7.) Petitioner does not dispute that an individual can be convicted under Section 922(g) without being the owner of a firearm. Nonetheless, the ownership of the Firestar firearm is a factor the jury is likely to have considered in determining whether Petitioner actually possessed the firearm.[3] Specifically, if the jury believed Cookston owned the Firestar firearm, it is likely the jury would have also believed his testimony that the firearm was in the back of his Ford Explorer, not in Petitioner's possession, at the time of Petitioner's arrest. (R. 3:136.) As set forth above, if Arwood and Walston would have testified, the jury would have been more likely to believe Cookston's testimony and less likely to believe Deputy Novak's testimony. In addition, the government would not have been able to challenge Cookston's credibility as it did and would not have been able to imply Cookston was lying based on Arwood and Walston's absence from Petitioner's trial.

The government further argues that Smith's testimony "would have had no value" because Smith had

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[3] At the hearing on Petitioner's motion under Section 2255, St. John agreed that Cookston's ownership of the Firestar firearm was one of the defenses he asserted on behalf of Petitioner. (R. 7:91.)

"left the premises" when Petitioner was arrested. (Opp'n at 4 & 8.) The government, however, fails to inform the Court that when Smith "left the premises" he had merely walked down to a neighboring business and that only "two to three" minutes had elapsed between the time he last saw Petitioner until the time Petitioner was arrested. (R. 7:62.) Accordingly, Smith's testimony would have had value. In particular, Smith would have been able to testify that he was working with Petitioner on a vehicle outside of the audio auto store just minutes before Petitioner was arrested, and Petitioner did not possess the Firestar firearm as alleged. (R. 7:56-60.) Smith would have further testified that Petitioner was wearing elastic shorts that would not have supported the firearm. (*Id.*)

With Smith's testimony that Petitioner was not in possession of the Firestar firearm and Arwood and Walston's testimony that Cookston owned the firearm, there is a reasonable probability that there would have been a different result in the outcome of Petitioner's trial. *See Strickland v. Washington*, 466 U.S. 668, 685 (1984).

CONCLUSION

Based on the evidence presented in this matter, reasonable jurists would find the district court's assessment of whether St. John provided ineffective assistance of counsel by failing to conduct an adequate investigation of the

charges against Petitioner debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Petitioner therefore respectfully requests that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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